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Jacqueline Smith			
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FEDERAL COURT

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Application for Judicial Review under Sections 18 and 18.1 of the
Federal Courts Act, R.S.C. 1985, c. F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at 180 Queen Street West, Toronto, Ontario, M5V 3L6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

February 18, 2022

Issued by:

Address of local office: 180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: **ATTORNEY GENERAL OF CANADA**
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
Suite #400
Toronto, Ontario M5H 1T1

APPLICATION

This is an application for judicial review in respect of the *Proclamation Declaring a Public Order Emergency*, SOR/2022-20 [*Emergency Proclamation*], made pursuant to s. 17(1) of the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.). This is also an application for judicial review in respect of the following regulations made pursuant to s. 19(1) of the *Emergencies Act*: the *Emergency Measures Regulations*, P.C. 2022-107, SOR/2022-21, and the *Emergency Economic Measures Order*, P.C. 2022-108, SOR/2022-22.

THE APPLICANT MAKES APPLICATION FOR:

1. an order quashing the *Emergency Proclamation*;
2. an order quashing the *Emergency Measures Regulations*;
3. in the alternative to (2),
 - (a) an order that ss. 2, 4, and 5 of the *Emergency Measures Regulations* are inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms* [*Charter*], and that such inconsistency cannot be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Charter*, as well as an immediately effective declaration that these sections are of no force and effect, pursuant to s. 52(1) of the *Constitution Act, 1982*;
 - (b) an order that ss. 2 and 4 of the *Emergency Measures Regulations* are inconsistent with s. 2(c) and s. 2(d) of the *Charter*, and that such inconsistency cannot be demonstrably justified in a free and democratic society, pursuant to

- s. 1 of the *Charter*, as well as an immediately effective declaration that these sections are of no force and effect, pursuant to s. 52(1) of the *Constitution Act, 1982*;
- (c) an order that s. 10 of the *Emergency Measures Regulations* is inconsistent with s. 7 of the *Charter*, and that such inconsistency cannot be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Charter*, as well as an immediately effective declaration that this section is of no force and effect, pursuant to s. 52(1) of the *Constitution Act, 1982*;
4. an order quashing the *Emergency Economic Measures Order*;
5. in the alternative to (4), an order that s. 5 of the *Emergency Economic Measures Order* is inconsistent with s. 8 of the *Charter*, and that such inconsistency cannot be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Charter*, as well as an immediately effective declaration that this section is of no force and effect, pursuant to s. 52(1) of the *Constitution Act, 1982*;
6. a hearing of this matter on an expedited basis;
7. an order that there be no costs of this proceeding; and
8. such further and other relief as counsel may advise and as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

Overview

1. This application arises out of the federal government's decision to invoke the *Emergencies Act* to quell protests centered in Ottawa, Ontario, and at various border crossings, as well as to pre-empt further action elsewhere.
2. The *Emergencies Act*, when properly invoked, grants an extraordinary amount of power to the executive branch of the federal government. The Act was intended to address situations of war, invasion, and other national emergencies that are so exigent and threatening that they cannot be dealt with under existing laws or through typical democratic processes.
3. Since the passage of the *Emergencies Act* in 1988, Canada has faced numerous national crises. There have been terrorist attacks, economic collapses, and a pandemic. All of these situations were dealt with using existing laws and normal democratic processes, or, when absolutely necessary, municipal or provincial emergency powers. There have also been national protest movements that occupied public spaces and city streets for months and blockaded critical infrastructure such as railways — essential democratic activity that frequently supports marginalized communities' struggles for equality and justice. These too have been responded to within the context of existing laws.
4. The federal government argues that the current situation is different — that the protests currently occurring in Canada are distinct from other previous national crises, so much

- so that they can justify resort to the federal *Emergencies Act* for the first time in Canadian history.
5. The *Emergencies Act*, however, contains stringent preconditions for its invocation. In recognition of the extreme nature of the powers that it grants and the risk of overreach and misuse, the legislative drafters included very high legal thresholds that had to be met before the powers under the Act could be used. Those thresholds have not been met. There is no nationwide public order emergency within the meaning of the Act. The protests can be, and in many cases already have been, managed under existing Canadian law. The government's proclamation of a national emergency on February 14, 2022, and the orders flowing from that proclamation, are therefore unlawful and unconstitutional.
 6. The protests at issue began in late January 2022 when, following the imposition of a COVID-19 vaccine mandate for truck drivers crossing the Canada-United States border, a convoy of vehicles began travelling from British Columbia to Ontario. This convoy has since become known as the "Freedom Convoy". By January 28, 2022, the Freedom Convoy had arrived in Ottawa, along with thousands of loosely affiliated and unaffiliated protestors. It is now apparent that the protests take aim at measures beyond the vaccine mandate for cross-border truck drivers and raise more general concerns about governmental and regulatory responses to the pandemic.
 7. As the protests in Ottawa continued into February, similar but smaller local protests sprang up in other parts of Canada, including in Winnipeg, Manitoba, and Enfield and Halifax, Nova Scotia. The most notable of these local protests included the blockading

of ports of entry at the Ambassador Bridge in Windsor, Ontario, a provincial highway in Sarnia, Ontario, the Peace Bridge in Fort Erie, Ontario, and international border crossings at Emerson, Manitoba, and Coutts, Alberta.

8. Many individuals involved in these protests have been entirely law-abiding and peaceful. Many others have engaged in forms of non-violent disruptive action that have had a significant and at times harmful impact on local residents, including: blockading roadways; driving vehicles slowly, thereby disrupting traffic; chanting; marching; sitting-in on city streets; erecting structures in public space; and creating noise by honking horns. There have also been disturbing reports of individual protestors or small groups of people engaging in violent and discriminatory acts. In Coutts, Alberta, for example, the RCMP discovered a cache of guns, ammunition, and body armour which led to the immediate arrest of 13 individuals. In Ottawa, there have been reports that some of the protesters engaged in physical and verbal harassment, as well as intimidation on the basis of race and property destruction on the basis of homophobic bias. This has been deeply disturbing to residents of Ottawa and people across the country, and in particular has created fear amongst racialized and marginalized communities. There is no doubt that these incidents are more than disruptive — they are dangerous, harmful, and unacceptable.
9. Given this context, it is no surprise that many municipal and provincial governments, along with local police services across the country, have actively worked to manage the situations in their respective jurisdictions. The government of Ontario has instituted a state of emergency and made it an offence to disrupt critical infrastructure, while Nova Scotia's government has issued an emergency directive prohibiting protestors

from blockading or disrupting traffic. Police across the country have been called in to prepare for and respond to protests in numerous cities, where they have successfully limited disruptions to essential services while still ensuring that protestors can exercise their peaceful assembly rights. The courts have also been active, issuing injunctive relief targeting some of the most disruptive and harmful behaviour.

10. In sum, the vast majority of protests across this country have been handled by local authorities using existing laws, and indeed several provinces have stated that resorting to the *Emergencies Act* is unnecessary. Despite this fact, the federal government nevertheless proclaimed the existence of a public order emergency throughout the country.
11. The legislative thresholds have not been met and, for that reason, the *Emergency Proclamation* is unreasonable and *ultra vires*.
12. Legal resort to these powers requires that the executive have a reasonable basis for believing that there is (a) a threat to the security of Canada and (b) that threat is serious enough to be a national emergency. This requires showing, among other things, that the lives, health, or safety of Canadians has been seriously endangered, and that neither the provinces nor existing law are capable of dealing with that danger. The extraordinary powers granted under the *Emergencies Act* are reserved for unforeseen circumstances that the numerous laws and regulations of this country cannot address. Protests and demonstrations — even loud and lengthy ones — do not fall within this category.

13. The government has failed to discharge its burden to establish either a threat to the security of Canada or a national emergency. The *Emergencies Act* does not permit the government to proclaim an emergency based on unspecified concerns about economic instability and international trade, a general sense of public unrest, or donations to a cause from people outside of Canada. Even the presence of a small number of dangerous individuals in specific locations, while deeply concerning and a proper priority for law enforcement officials, would not be enough to justify the proclamation of a *nation-wide* emergency. A proclamation of emergency cannot be grounded in nebulous or strained claims about unspecified danger.
14. Moreover, the provinces have shown that they are capable of dealing with the protests using existing law. The fact that some protests remained for longer than others, or were more disruptive than others, is not in and of itself an indication of a lack of capacity or legal powers. The most economically disruptive forms of protest, such as the blockades at ports of entry to Canada, were largely resolved with provincial powers and prior to the *Emergency Proclamation*. Likewise, the armed faction in Coutts was neutralized.
15. While the federal government and many Canadians may disagree with the nature and extent of the various municipal and provincial responses, this disagreement is no justification for resorting to the *Emergencies Act* to take control of provincial powers and blur the lines that federalism firmly draws.
16. The decision to invoke the *Emergencies Act* must also be scrutinized in light of the sweeping *Charter* implications of the regulations made in reliance on the *Emergency Proclamation* (i.e., the *Emergency Measures Regulations* and the *Emergency*

Economic Measures Order). These regulations inhibit protest in a manner that offends the fundamental freedoms of free expression, peaceful assembly, and association. Many protests, including those brought by communities who often have no other way of having their concerns heard, are both largely peaceful and intensely disruptive. Such protests are an essential part of life in a vibrant democracy. The regulations at issue here also undermine protest by conscripting certain institutions into funneling protestors' financial information to the RCMP and CSIS, contrary to the right to be free from unreasonable search and seizure. These regulations apply everywhere in Canada, despite the fact that the protests are focused in discrete areas.

17. Accordingly, the government's resort to its emergency powers cannot be justified in relation to the factual and legal constraints at play. Ultimately, the exercise of executive power here lacks the intelligibility and justification necessary to survive judicial review by this Court.

The Emergencies Act

18. The *Emergencies Act* empowers the Governor in Council to proclaim, among other things, a "public order emergency".
19. A public order emergency is defined in s. 16 of the *Emergencies Act* and arises where two objective threshold requirements are met.
20. First, there must be "threats to the security of Canada". This phrase has the meaning ascribed by s. 2 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, which sets out four types of threats:

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

21. However, “threats to the security of Canada” do *not* include “lawful advocacy, protest or dissent”, unless it involves any of the activities referred to above.

22. Second, the situation must be serious enough to constitute a “national emergency”, which is defined in s. 3 of the *Emergencies Act* as follows:

For the purposes of this Act, a national emergency is an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.

23. Section 17(1) of the *Emergencies Act* authorizes the Governor in Council to proclaim a public order emergency upon believing, on reasonable grounds, that such an emergency exists and necessitates the taking of special temporary measures. In the

event that the effects of the emergency do not extend to the whole of Canada, s. 17(2)(c) requires that the proclamation specify the area(s) of Canada to which the emergency extends.

24. While the proclamation of a public order emergency persists, s. 19(1) of the *Emergencies Act* supplies the Governor in Council with the power to make such orders or regulations as are believed to be necessary for dealing with the emergency. However, pursuant to s. 19(3), this power must be exercised or performed in a manner that will not unduly impair the ability of any province to take measures for dealing with an emergency in the province and with the view of achieving, to the extent possible, concerted action with each province.

The Emergency Proclamation

25. The *Emergency Proclamation* was issued on February 14, 2022, pursuant to s. 17(1) of the *Emergencies Act*. It proclaimed that a public order emergency exists throughout the entirety of Canada.
26. The proclamation specifies that the emergency is principally the result of “blockades”. In particular, it states that the emergency is constituted of:

(a) the continuing blockades by both persons and motor vehicles that is occurring at various locations throughout Canada and the continuing threats to oppose measures to remove the blockades, including by force, which blockades are being carried on in conjunction with activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada,

(b) the adverse effects on the Canadian economy — recovering from the impact of the pandemic known as the coronavirus disease 2019 (COVID-19) — and threats to its economic security resulting from the impacts of blockades of critical infrastructure, including trade corridors and international border crossings,

(c) the adverse effects resulting from the impacts of the blockades on Canada's relationship with its trading partners, including the United States, that are detrimental to the interests of Canada,

(d) the breakdown in the distribution chain and availability of essential goods, services and resources caused by the existing blockades and the risk that this breakdown will continue as blockades continue and increase in number, and

(e) the potential for an increase in the level of unrest and violence that would further threaten the safety and security of Canadians.

27. The proclamation also contemplates that certain special temporary measures may be necessary for dealing with the emergency, including “measures to regulate or prohibit any public assembly — other than lawful advocacy, protest or dissent — that may reasonably be expected to lead to a breach of the peace”, “measures to authorize or direct any person to render essential services ... including services related to the removal, towing and storage of any vehicle ... that is part of a blockade”, and measures to authorize or direct any person to render essential services to relieve the impacts of the blockade”.

28. The *Emergency Proclamation* will remain in force for 30 days beginning February 14, 2022, unless it is revoked by a vote at the House of Commons or the Senate. From that point, it may be continued in accordance with the provisions of the *Emergencies Act*.

The Emergency Measures Regulations and the Emergency Economic Measures Order

29. On the basis that the *Emergency Proclamation* was effective, the *Emergency Measures Regulations* and the *Emergency Economic Measures Order* were enacted on February 15, 2022.
30. The *Emergency Measures Regulations* create four key prohibitions backed by the threat of conviction and imprisonment.
31. Section 2(1) prohibits participation in a public assembly that may be reasonably expected to lead to a breach of the peace by:
 - (a) the serious disruption of the movement of persons or goods or the serious interference with trade;
 - (b) the interference with the functioning of critical infrastructure; or
 - (c) the support of the threat or use of acts of serious violence against persons or property.
32. Section 3 prohibits foreign nationals from entering Canada with the intent to participate in or facilitate a s. 2 assembly.
33. Section 4(1) prohibits everyone from travelling to an area where a s. 2 assembly is taking place, subject to various exemptions (“Prohibition on Travel to an Assembly”).
34. Section 5 is perhaps the broadest prohibition of all, prohibiting anyone from directly or indirectly providing property to facilitate or participate in any s. 2 assembly or for the purpose of benefitting any person who is facilitating or participating in such an

assembly (“Prohibition on the Provision of Property”). This provision also extends to similar use, collection, making available, or inviting a person to provide such property.

35. Section 10(2) creates penalties for failure to comply with the *Emergency Measures Regulations*:

(2) In the case of a failure to comply with these Regulations, any peace officer may take the necessary measures to ensure the compliance and allow for the prosecution for that failure to comply

(a) on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both; or

(b) on indictment, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding five years or to both.

(“Prosecution Provision”)

36. The *Emergency Economic Measures Order* contains provisions that compound the impact of the *Emergency Measures Regulations*. Most importantly, s. 2(1) requires banks, credit unions, insurance companies, securities dealers, money services businesses, crowd-funding platforms, and payment service providers to freeze the assets and accounts of “designated person[s]” (the “Freezing Measures”). Designated persons include any individual who is engaged, directly or indirectly, in an activity prohibited by ss. 2 to 5 of the *Emergency Measures Regulations*. This freezing must occur immediately upon the coming into force of the *Emergency Economic Measures Order*.

37. Pursuant to s. 3 of the *Emergency Economic Measures Order*, the above institutions also have a duty to determine, on a continuing basis, whether they are in possession or

control of property owned, held, or controlled by or on behalf of a designated person. If they are, the institutions must register with the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”), pursuant to s. 4(1). These entities must also disclose, without delay, to the Commissioner of the Royal Canadian Mounted Police or to the Director of the Canadian Security Intelligence Service:

- (a) the existence of property in their possession or control that they have reason to believe is owned, held or controlled by or on behalf of a designated person; and
- (b) any information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

The Emergency Proclamation Is Unreasonable and Ultra Vires

- 38. As with any exercise of authority granted by a federal statute, the *Emergency Proclamation* must be consistent with the scope of the statutory mandate and meet the requirements of its enabling legislation. In this regard, it fails.
- 39. The *Emergency Proclamation* is not justified in light of the legal and factual constraints that bear upon it, most notably the governing statutory scheme and the powers it confers, which broadly impact individuals’ *Charter*-protected rights.

Governing Statutory Scheme

- 40. The *Emergency Proclamation* fails to meet the two threshold requirements of the *Emergencies Act*: threats to the security of Canada and a national emergency.
- 41. The *Emergencies Act* requires that there be reasonable grounds to believe that these threshold requirements are met. This requires more than just speculation, suspicion,

political pressure, or even apprehension — there must be an objectively reasonable belief based on compelling and credible evidence.

42. The first threshold requirement — that there be threats to the security of Canada — is not met. None of the four threats set out in the *Canadian Security Intelligence Service Act* are present. A public protest does not qualify as “espionage or sabotage”, as required by s. 2(a). Even if that protest were a “foreign influenced activity” simply because it is partly supported by crowdfunding from other countries, it is neither clandestine nor deceptive; it also does not, as a whole, involve a threat to any person, as required by s. 2(b). While it is true that the protest — like any protest — is designed to active to achieve a political objective, there is no compelling evidence that this objective is generally being pursued by acts of “serious violence”, as required by s. 2(c). And there is likewise no sustainable suggestion that the constitutionally established system of government in Canada is being imperilled by covert unlawful acts or an “overthrow by violence”, as required by s. 2(d).
43. The second threshold requirement — that there be a “national emergency” — similarly is not met.
44. How the protests and blockades seriously endanger the lives, health, or safety of Canadians, as required by the definition of “national emergency”, is not apparent from either the *Emergency Proclamation* or the explanation tabled pursuant to s. 58(1) of the *Emergencies Act*. Disruption does not meet this threshold, and the actions at issue have been generally peaceful. While the *Emergency Proclamation* refers to adverse effects on the Canadian economy, it fails to demonstrate any connection between those effects

and the lives, health, and safety of Canadians. Although the proclamation refers to a supply chain breakdown, there is no compelling evidence that Canadians will go without necessities in a way that would endanger them — particularly not now given that the situation at the Ambassador Bridge and those in Fort Erie, Ontario, and Coutts, Alberta, have been resolved. The same is true of the proclamation’s oblique reference to adverse effects on Canada’s “relationship with its trading partners”. Finally, while there is a reference to a potential violence and unrest, the government must have some basis — beyond a large gathering of dissenters — for considering this potential to be real and substantial. It does not.

45. Even if there were a basis for believing that certain of the protests cause sufficient danger, the federal government goes too far in suggesting that danger is present throughout the entirety of the country. At most, a few localities are facing the acute effects of the protests. The vast majority of the country is not affected, much less endangered, by the protests — and yet, every person in Canada is now living under a proclaimed public safety emergency, and is subject to the orders made on the basis of that emergency.
46. However serious or widespread the danger at issue truly is, it is unreasonable to contend that it “exceed[s] the capacity or authority of a province to deal with it”. The protests *can* be effectively dealt with under other laws of Canada. These are also essential elements of a “national emergency”.
47. Among other things, the criminal law is more than capable of addressing all of the federal government’s concerns, through specific offences like mischief, unlawful

assembly, causing a disturbance, or nuisance, as well as the powers concomitant to arrest. Municipal by-laws also operate to similar effect.

48. As recent judicial orders have shown, injunctions are available to restrain the conduct said to be creating an emergency. Injunctions have a long history of being resorted to in order to deal with demonstrations or protests that cause economic harm. In relation to the current protests, injunctions have been granted to restrain the use of horns and vehicle idling, to enforce by-laws regarding the same, and to force protestors to leave the Ambassador Bridge. This latter injunction in particular has proved effective: the Bridge is now open, and it was opened before the proclamation of any federal emergency.
49. All of the foregoing laws can also be bolstered by the imposition of a *provincial* state of emergency. This is the approach Ontario's government has taken. On February 11, 2022 — four days before the federal government's invocation of the *Emergencies Act* — an emergency was already declared in the Province of Ontario, pursuant to O. Reg. 69/22. The next day, O. Reg. 71/22 [*Critical Infrastructure and Highways Regulation*] was enacted. Among other things, this regulation enjoins individuals from impeding access to critical infrastructure and highways and extends to police officers the power to order individuals to do the same. The overlap of the *Critical Infrastructure and Highways Regulation* and the *Emergency Measures Regulations* belies the contention that the provinces did not have the capacity to address the protests at issue.
50. Moreover, the *Critical Infrastructure and Highways Regulation* is backed by the force set out in the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, s.

7.0.11, which creates substantial fines for the contravention of emergency orders or the obstruction of persons performing duties conferred by such orders:

Offences

7.0.11 (1) Every person who fails to comply with an order under subsection 7.0.2 (4) or who interferes with or obstructs any person in the exercise of a power or the performance of a duty conferred by an order under that subsection is guilty of an offence and is liable on conviction,

(a) in the case of an individual, subject to clause (b), to a fine of not more than \$100,000 and for a term of imprisonment of not more than one year;

(b) in the case of an individual who is a director or officer of a corporation, to a fine of not more than \$500,000 and for a term of imprisonment of not more than one year; and

(c) in the case of a corporation, to a fine of not more than \$10,000,000.

Separate offence

(2) A person is guilty of a separate offence on each day that an offence under subsection (1) occurs or continues.

51. To an extent, the Government's precipitous invocation of the *Emergencies Act* appears to have been motivated by its view that the provinces have not gone far enough in addressing intraprovincial protest. However, this does not mean that the provinces lack the *capacity* or *authority* to deal with the protests, nor does it mean that that the laws of Canada are *incapable* of dealing with them. To the contrary, the provinces have all the tools they need. The *Emergencies Act* was not intended to provide the federal government a pathway to arrogate provincial powers to itself in circumstances where the provinces do not exercise those powers in the way the federal government would

have. Use of the Act in this way strains the balance that federalism demands and exceeds the intention behind the *Emergencies Act*.

Impact on Individuals' Charter-Protected Rights

52. The reasonableness of the Government's resort to the *Emergencies Act* must also have regard to the substantial, *Charter*-infringing impacts of the regulations that the *Emergency Proclamation* has enabled under s. 19(1) of the *Emergencies Act*.
53. The prohibitions set out in the *Emergency Measures Regulations* — namely, the Prohibition on Public Assembly, the Prohibition on Travel to an Assembly, and the Prohibition on Providing Property — offend fundamental freedoms enshrined in the *Charter*. In so doing, they inhibit basic and essential forms of democratic participation.
54. Each of these Prohibitions infringes s. 2(b) of the *Charter*, which protects freedom of expression. All of the prohibited activities contain expressive content, thereby falling within the protected sphere of free expression. The prohibition of those activities, in both purpose and effect, infringes that protection.
55. The Prohibition on Public Assembly and the Prohibition on Travel to an Assembly infringes s. 2(c) of the *Charter*, which protects freedom of peaceful assembly, for similar reasons. The former prohibition captures any assembly that may be “reasonably expected” to lead to a breach of the peace. In this way, it prohibits assembly *before it occurs* and before it becomes an assembly that *might* fall outside the scope of s. 2(d). By prohibiting assemblies that are by definition peaceful — or that at least have

- not yet become non-peaceful — and by prohibiting individuals (and, effectively, their children) from travelling to attend such assemblies, these prohibitions infringe s. 2(c).
56. Also for similar reasons, the Prohibition on Public Assembly and the Prohibition on Travel to an Assembly infringe s. 2(d) of the *Charter*, which protects freedom of association. These prohibitions prohibit individuals from meeting and forming associations, discouraging the collective pursuit of common goals and striking at the heart of this freedom.
57. The Prosecution Provision of the *Emergency Measures Regulations* creates an offence punishable by imprisonment for failure to comply, thereby engaging the liberty interests protected by s. 7 of the *Charter*. This offence is not consistent with the principles of fundamental justice of overbreadth and gross disproportionality, as it captures peaceful protest that goes far beyond the objective of the regulations.
58. The *Emergency Economic Measures Order* likewise creates serious, *Charter*-infringing impacts. Among other things, this regulation requires a battery of financial institutions and businesses to freeze or suspend accounts held by “designated persons” (i.e., persons “engaged, directly or indirectly, in an activity prohibited by sections 2 to 5 of the *Emergency Measures Regulations*”). Moreover, s. 5 of the order conscripts financial institutions into disclosing — to the RCMP or CSIS — whether they are holding property that they believe is owned, held, or controlled by or on behalf of a designated person. As this section requires that the existence of this property and information related to it be delivered to the authorities without judicial authorization or

reasonable and probable grounds, it compels searches that are contrary to s. 8 of the *Charter*.

59. All of these measures are now in force and were also contemplated to varying degrees in the *Emergency Proclamation* itself.
60. The reasonableness of the federal government's decision to enact the *Emergency Proclamation* must have regard to these impacts on individuals' rights and interests. These concerns are central to the necessity of adequate justification — justification that is decidedly lacking here.
61. In light the above legal and factual constraints that bear upon it, the *Emergency Proclamation* is unreasonable and *ultra vires*.

The Emergency Measures Regulations and the Emergency Economic Measures Order Are Inconsistent with the Charter

62. On the basis set out above, each of the Prohibition on Public Assembly, the Prohibition on Travel to an Assembly, the Prohibition on Providing Property and the Prosecution Provision are inconsistent with various of s. 2(b), 2(c), and 2(d), and 7 of the *Charter*.
63. On the basis set out above, s. 5 of the *Emergency Economic Measures Order* is inconsistent with s. 8 of the *Charter*.
64. None of these infringements can be justified under s. 1. The pressing and substantial objective pursued by the regulations at play here must be to end the protests and the blockades and to address their impacts. However, particularly in light of the alternative

measures available and the application of these orders to the entirety of the country, the regulations cannot be said to be minimally impairing of the rights at issue, nor can they be said to be proportionate to their objective.

The CCLA Meets the Test for Public Interest Standing

65. The Applicant, the Canadian Civil Liberties Association (“CCLA”), brings this application on the basis of public interest standing.
66. The CCLA is an independent, non-profit, non-governmental organization that is dedicated to actively defending and promoting the recognition of fundamental human rights and civil liberties.
67. Since its inception in 1964, the CCLA has been holding governments accountable by ensuring those rights and freedoms are fostered and observed and that the rule of law is upheld. It advocates on behalf of all people in Canada to ensure that the critical balance between civil liberties and competing public and private interests are maintained.
68. The CCLA has made vital contributions to civil liberties and *Charter* jurisprudence in a variety of areas, by intervening in cases before courts at many levels. The CCLA has also been granted standing to litigate issues in its own right as a public interest litigant. The CCLA has a distinct, unique awareness and understanding of many aspects of civil liberties, as a result of arguing for the rights of people across Canada for decades.

69. The CCLA has a genuine interest in the issues raised in the Application as they are directly connected to the organization's mandate. The CCLA is engaged closely with these issues through its legal and policy advocacy, public education, and research.
70. Through litigation as a public interest litigant or as an intervenor, the CCLA has gained knowledge and expertise in the civil liberties and constitutional rights engaged by the federal government's invocation of the *Emergencies Act*, particularly in relation to free expression and assembly. CCLA has frequently been involved in litigation and policy debates that implicate the right to protest and consider the permissible nature and scope of state conduct in relation to protest activities.
71. The CCLA has the resources to pursue this judicial review thoroughly, effectively, and expeditiously. The CCLA is being represented by able and experienced counsel with the capacity to manage litigation of this nature. It will present a complete record that will assist this Court in making the findings of fact necessary to resolve the legal questions regarding interpretation of the *Emergencies Act* thresholds that lie at the heart of this case.
72. The immediate effect and serious consequences of the government's decision to invoke the *Emergencies Act* on the rights and freedoms of people across Canada requires an immediate consideration of the legality of that decision. It is reasonable and effective for the CCLA, with its decades of demonstrated interest in, and established expertise regarding, the issues raised in this application, to bring it forward in this timely manner.
73. Such further and other grounds as counsel may advise.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. the Affidavit of Abby Deshman; and
2. such further and other evidence as counsel may advise and this Honourable Court may permit.

February 18, 2021



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